

GENTELA VIJAYAVARDHAN RAO AND ANR.

v.

STATE OF ANDHRA PRADESH

AUGUST 28, 1996

[DR. A.S. ANAND AND K.T. THOMAS, JJ.]

Criminal Law :

Penal Code, 1860 : Sections 302, 303, 341, 440 and 120-B.

Death sentence—'Rarest of rare case'—Murder and robbery—Large number of Victims—Effect of—Accused set a bus on fire in order to rob the passengers in which 23 passengers were killed and many sustained severe burns—Held : In the circumstances of the case, accused deserved the extreme penalty of death sentence—Number of victims not altogether outside the consideration in awarding death sentence.

Evidence Act, 1872 : Sections 6, 32 and 157.

Res gestae—Nature and scope of—Dying declaration—Recorded by Magistrate—Maker thereof did not die—Held : Such dying declaration ceases to have evidentiary value under S. 32—It can be used to corroborate or contradict the testimony of its maker under S. 157—Rule of res gestae is an exception to the general rule that hearsay evidence is not admissible—However, fact or statement must form part of same transaction—Interval between commission of offence and recording of statement makes such statement inadmissible in evidence.

Criminal trial—Circumstantial evidence—Crime articles—Recovery of—Wrist watch belonging to victim recovered from pawn broker—Witness produced counterfoil of pledge receipt in support of his statement that accused pledged wrist watch with him—Held : This is a circumstance which ensures that the victim was absolutely truthful—Equally effective is the evidence of the witness that the accused produced pants after arrest which was identified by the victim as his pants which the accused had grabbed from him on the date of occurrence.

Words and Phrases :

A *"Investigate" and "legally competent"—Meaning of—In the context of—Evidence Act, 1872, S. 157.*

B The appellants-accused were convicted for offences under Sections 302, 307, 392, 341, 440 and 120-B of the Indian Penal Code, 1860. The Sessions Court sentenced both the appellants to death penalty for the offence of murder and criminal conspiracy. For the offences under Sections 307 and 392, the appellants were sentenced to imprisonment for life and rigorous imprisonment for 10 years respectively. The High Court confirmed the conviction and sentence. Hence this appeal.

C According to the prosecution, the appellants set a bus on fire in which 23 passengers were killed, and a number other passengers sustained serious burns. The appellants were motivated by lust for wealth by robbing the passengers. A handful of passengers could wriggle out of the blazing vehicle in their thirst to live by escaping from the talons of fire. One of them (PW-5) was chased by the first appellant and was caught. The first appellant forcibly grabbed his trousers (pants) containing some cash in the pocket but in turn he supplied his half burnt pants to PW-5 obviously to cover up nudity. During the same time second appellant chased another passenger (PW-1) and succeeded in intercepting him after covering some distance, and he robbed the wrist watch and cash of Rs. 700 from the victim. The culprits then escaped from the scene with the booty.

F The police also recovered the wristwatch belonging to PW- 1 from a pawnbroker. The counterfoil of the pledge receipt was produced by him. The Deputy Superintendent of Police (PW-63) had deposed that the first appellant produced pants after arrest and the same was identified by PW-5 as his pants which first appellant had grabbed from him on the date of occurrence.

G In the appeal before this Court on behalf of the accused persons it was contended that there were three circumstances, as mitigating features; first, the appellants were of young age (one of them must be 26 years now and the other man is around 23); second the prime motive of the appellants was not murder but only robbery and the act of incendiarism might have been committed in the weak moment; third, appellants did not prevent at least some of the passengers, who tried to get out of the bus from escaping out of the scene.

H

Dismissing the appeal, this Court

HELD : 1.1. The three circumstances advanced by the appellant are too slender for treating them as mitigating circumstances. Even assuming that such circumstances have any mitigative overtone they have been totally eclipsed by the other billowing aggravative features looming large in the bizarre scenario of the crime unfurled in the evidence. True, number of victims by itself is not a yardstick to discern a case of the category described by the Constitution Bench in *Bachan Singh's* case. Nonetheless number of victims is not altogether outside the scope of consideration and should not be marginalised in appropriate cases. [284-D-F]

1.2. There is no doubt that this is one of the rarest of the rare cases not merely because of the record number of innocent human beings roasted alive by the appellants but by the inhuman manner in which they have plotted the scheme and executed it. What they needed, perhaps, was only wealth by plundering others. For that motive they designed a scheme with the highest proportion of viciousness. Carrying most inflammable liquid in a cane together with a matchbox they checked into a passenger bus during the dawn of the ill-fated day. None of the harmless faces of the unfortunate passengers, not even those of some cute children in the bus, had deterred these appellants from incinerating them into charred corpses in a split second. When human mind was allowed to be transformed itself into such demonic form and the planned pogrom was executed with extreme depravity, the courts below were justified in holding this was one of the rarest of the rare cases in which alternative option was unquestionably foreclosed. [284-G-H; 285-A-B]

Bachan Singh v. State of Punjab, [1980] 2 SCC 684 and *Machhi Singh v. State of Punjab*, AIR (1983) SC 957, followed.

Dhananjay Chatterjee v. State of West Bengal, [1994] 2 SCC 220 and *Sheikh Ishaque v. State of Bihar*, [1995] 3 SCC 392, relied on.

2.1. The principle of the law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognised in English Law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in

A making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact for statement must be part of the same transaction. Such statement must have been made contemporaneous with the acts, which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*.

2.2. In the present case, there was some appreciable interval between the acts of incendiarism indulged in by the miscreant and the judicial magistrate recording statements of the victims. That interval, therefore, blocks the statement from acquiring legitimacy under Section 6 of the Evidence Act.

R. v. Lillyman, (1896) 2 Q.B. 167 and *Taper v. R.*, (1952) 2 All E.R. 447, referred to.

2.3. Though the statement given to a magistrate by someone under expectation of death ceases to have evidentiary value under Section 32 of the Evidence Act if the maker thereof did not die; such a statement has, nevertheless, some utility in trials, it can be used to corroborate this testimony in court under Section 157 of the Evidence Act which permits such use, being a statement made by the witness "before any authority legally competent to investigate." The word investigate has been used in the Section in a broader sense. Similarly the words "legally competent" denote a person vested with the authority by law to collect facts. A magistrate is legally competent to record dying declaration "in the course of an investigation" as provided in Chapter XII of the Criminal Procedure Code 1973. The contours provided in Section 164(1) would cover such a statement also. However, such a statement, so long as its maker remains alive, cannot be used as substantive evidence. Its user is limited to corroboration or contradiction of the testimony of its maker.

Maqsoodan v. State of U.P., AIR (1983) SC 126, relied on.

3. The recovery of the wristwatch, belonging to PW-1 from a pawnbroker and production of the counterfoil of the pledge receipt by the pawnbroker in support of his statement that the second appellant had pledged the wristwatch with him, is a clinching circumstance which en-

sure confidence in the judicial mind that PW-1 was absolutely correct when he said that he was robbed of his wristwatch by the second appellant. Equally effective is the evidence of DSP (PW-63) that first appellant produced pants after arrest. The same was identified in court by PW-5 as his pants which first appellant has grabbed from him on the date of occurrence.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 195 of 1996.

From the Judgment and Order dated 2.11.95 of the Andhra Pradesh High Court in CrI.A. No. 620 of 1995.

S. Ravindra Bhat, Rakesh Shukla, Naveen R. Nath and Ms. Hetu Arora for the Appellants.

A. Raghubir and Guntur Prabhakar for the Respondent.

The Judgment of the Court was delivered by

THOMAS, J. This is a case involving death of 23 passengers in a bus. When the Super Express Bus set out its journey from Hyderabad to the terminal Chilakaluripet, none of the passengers nor its driver nor the conductor had any foreboding that the vehicle was heading to a very horrendous tragedy en route. The vehicle was set on fire and 23 passengers were roasted to death, besides a number of other passengers sustained serious burns. The two appellants before us were arraigned for converting the stage carriage into a wheeled inferno motivated by lust for wealth by robbing the passengers. Trial court convicted them and sentenced them to the extreme penalty under law. High Court confirmed the conviction and sentence. They have come up with this appeal by special leave.

More details of the case :

On the fateful day (8.3.1993) the Super Express Bus was driven by PW- 6 Lakshminarayana for operating service on the route Hyderabad - Chilakaluripet. The bus reached near a railway level crossing at Narasaraopet around 4.30 A.M. where it stopped to let two more passengers to board the bus which was already replete with passengers. Just after the bus was in motion again, PW-6 sensed smell of petrol and so he stopped the vehicle to verify the cause of it. Second appellant (Challapathy

A Rao) was dousing petrol inside the bus. First appellant (Vijayavaradhan Rao) had by then moved out of the bus and was ready with a match box. The fear-stricken passengers sprang on their feet and started making tantrums. Then second appellant exhorted the first appellant to get down after lighting the match stick which was implicitly carried out and the automobile was in flames in a trice.

B
C A handful of passengers could wiggle out of the blazing vehicle in their thirst to live by escaping from the talons of fire. One of them (Baburao - PW-5) was chased by the first appellant and was caught. His trousers (pants) containing some cash in the pocket were forcibly grabbed by the first appellant but in turn he supplied his half burnt pants to PW-5 obviously to cover up nudity. During the same time second appellant chased another passenger (PW-1) and succeeded in intercepting him after covering some distance, and he robbed the wrist watch and case for Rs. 700 from the victim. The culprits then escaped from the scene with the booty which apparently was a modicum for this dastardly exercise.

D
E At the scene of occurrence, rescue operations were briskly picked up at the instance of PW-6 (driver of the bus). However, a large number of passengers succumbed to extensive burns sustained in the incendiarism, though a few could survive for some more days but only to narrate their woeful tale to others. There were a few passengers and sustained less serious burns and some of them figured as witnesses in this case during trial.

F Police registered the crime case on the strength of the information furnished by PW-1. Appellants were arrested on 18.3.1993 and some incriminating articles were recovered pursuant to the information elicited by the police during interrogation. A test identification parade was conducted by PW-49, a judicial magistrate, in which the appellants were identified by some of the witnesses.

G After trial both appellants were found guilty under Section 302, 307, 392, 341, 440 and 120-B IPC. For the offence of murder and criminal conspiracy, learned Sessions Judge sentenced both appellants to death penalty. For the offence under Section 307 and Section 392, he sentenced them to imprisonment for life and R.I. for 10 years, respectively. Short term imprisonment was awarded to both the appellants for the remaining minor
H offences.

A Division Bench of the Andhra Pradesh High Court heard the reference made by the Sessions Judge for confirmation of the death sentence, along with the appeal filed by the appellants, in challenge of the conviction and sentence. High Court confirmed the conviction and sentence and dismissed the appeal. The reference was accordingly answered.

Shri S. Ravindra Bhat, learned counsel who argued for the appellants, quite at length, mainly contended that the Sessions Court and the High Court have erroneously concluded that identity of appellants as the culprits has been established and alternatively pleaded for reducing death penalty to the lesser sentence of imprisonment for life. It must be said in fairness to the learned counsel that he did not dispute the prosecution case that the bus with the passengers was put to flames at the time and place suggested by the prosecution.

We have been taken through the material evidence in this case. Regarding identity of the culprits the evidence seems to the overwhelming to support the conclusion concurrently reached by the two courts that appellants were the persons who set the bus ablaze. In spite of concurrent finding arrived at by the two courts we felt it necessary to scrutinise the evidence. We may make a brief reference to the material evidence in this appeal, particularly when the High Court has chosen to confirm the death sentence passed on two persons.

PW-6 - Lakshminarayana (driver of the bus) and PW-7 Jangu Kalisia Wali (conductor to the bus) have identified both appellants in the trial court as the persons who committed this crime. We further note that PW-6 had correctly pointed out these appellants during test identification parade conducted by the judicial magistrate. PW-1 Narayana Swamy and PW-5 (Baburao) have testified to the respective roles played by each appellant in the incident with clarity. PW-1 has a further case that while he was fleeing from the flames he was chased by the second appellant and after covering some distance he was caught and then PW-1 had to surrender his cash and wrist watch (MO-I) to the robber. PW-5 also has a similar story that when he ran to escape he was chased and intercepted by the first appellant who demanded his pants to be surrendered. PW-5 succumbed to the demand, but in return he got a partially burnt pants worn by first appellant. PW-9 Venkata Rao, another passenger who identified both the

A persons as the culprits further added that a little girl by name Vasavi, who too was in the bus, made a bid to avert further precipitation of the criminal acts at the first stage of perpetration of the crime by offering her gold necklace, put in the din and bustle he feeble voice would not have reached the ears of the marauders. In this context we refer to Ext. P-72 which is the dying declaration recorded by the judicial magistrate from a six year old girl called Vasavi who later succumbed to the burn injuries. We have no doubt that Vasavi, the declarant, was the same girl as referred to by PW-9 in his evidence.

C In addition to the above evidence, PW-63 (DSF - CID, Circular Zone) who conducted investigation in the case, has deposed that on the information supplied by the second appellant he recovered MO-1 wrist watch from a pawn broker. PW-12, a clerk attached to "Siva Pawn Brokers" at Guntur has given evidence that on 10.3.1993 second appellant had pledged an HMT wrist watch with him. For further support, PW-12 produced Ext. P-3 which is the counterfoil of the pledge receipt. This is a clinching circumstance which ensures confidence in the judicial mind that PW-1 was absolutely correct when he said that he was robbed of his wrist watch by the second appellant. Equally effective is the evidence of PW-63 DSP, that first appellant produced MO-II pants after arrest. The same was identified in court by PW-5 as his pants which first appellant had grabbed from him on the date of occurrence.

F Learned counsel for the appellants had invited our attention to the dying declarations made by some of the victims in which those declarants have stated that four persons had boarded the bus at the railway level cross and those four persons had participated in the crime. But the Sessions Court and the High Court did not consider that aspect as exculpatory of the acts attributed to these appellants. Perhaps those victims would have thought that in addition to the appellants there were two more persons to help them. That initial impression of two or three victims formed in the twilight is not enough to create any dent on the sturdy prosecution case which has been unfurled in the trial court by the witnesses.

H The judicial magistrate who recorded the dying declaration took down the statements of PW-5 and PW-7 also as dying declarations thinking that they too might succumb to the burns. There is no doubt that when they survived, their statement cannot be used as evidence under Section 32

of the Evidence Act. The High Court has rightly observed so. But those two statements (Ext. P-71 and Ext. P-75, respectively) were relied on by the High Court on the premise that "it is relevant and admissible as *res gestae* under Section 6 of the Evidence Act." A

If those statements (Ext. P-71 and Ext. P-75) are admissible as relevant under Section 6 of the Evidence Act they become substantive evidence. So we have to consider whether Ext. P-71 and Ext. P-75 could be treated as *res gestae*. B

The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*. In *R. v. Lillyman*, (1896) 2 Q.B. 167 a statement made by a raped woman after the ravishment was held to be not part of the *res gestae* on account of some interval of time lapsing between making the statement and the act of rape. Privy Council while considering the extent upto which this rule of *res gestae* can be allowed as an exemption to the inhibition against hearsay evidence, has observed in *Teper v. Reginam*, (1952) 2 All E.R. 447, thus : C D E F

"The rule that in a criminal trial hearsay evidence is admissible if it forms part of the *res gestae* is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely G H

A contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."

B The correct legal position stated above needs no further elucidation.

C Here, there was some appreciable interval between the acts of incen-
ciarism indulged in by the miscreants and the judicial magistrate recording
statements of the victims. That interval, therefore, blocks the statement
from acquiring legitimacy under Section 6 of the Evidence Act. High Court
was, therefore, in error in treating Exts. P-71 and P-75 as forming part of
res gestae evidence.

D Though the statement given to a magistrate by someone under ex-
pectation of death ceases to have evidentiary value under Section 32 of the
Evidence Act if the maker thereof did not die, such a statement has,
nevertheless, some utility in trials. It can be used to corroborate this
testimony in court under Section 157 of the Evidence Act which permits
such use, being a statement made by the witness "before any authority
legally competent to investigate". The word "investigate" has been used in
the section in a broader sense. Similarly the words "legally competent"
E denote a person vested with the authority by law to collect facts. A
magistrate is legally competent to record dying declaration "in the course
of an investigation" as provided in Chapter XII of the Code of Criminal
Procedure, 1973. The contours provided in Section 164(1) would cover
such a statement also. Vide *Magaeodan and Others v. State of U.P.*, AIR
(1983) SC 126. However, such a statement, so long as its maker-remains
F alive, cannot be used as substantive evidence. Its user is limited to cor-
roboration or contradiction of the testimony of its maker.

G The result of the above discussion is, there is no reason to disturb
the conviction of the appellants under different offences passed by the trial
court and confirmed by the High Court.

H Now we have to deal with the plea for reducing death penalty to the
lesser alternative sentence of imprisonment for life, learned counsel high-
lighted three circumstances, as mitigating features, for persuading us to
scale down the death sentence. First is, appellants were of young age (one
of them must be 26 years now and that other man is around 23). Second

is, the prime motive of the appellants was not murder but only robbery and the act of incendiarism might have been committed in a weak moment. Third is, appellant did not prevent at least some of the passengers, who tried to get out of the bus, from escaping out of the scene.

Death sentence remains in the statute book and its constitutional validity stands approved by the Constitution Bench in the celebrated decision of *Bachan Singh v. State of Punjab*, [1980] 2 SCC 684 : AIR (1980) SC 898. The Constitution Bench while upholding the validity of death sentences, has laid down, as a legal principle, that such sentence can be awarded only in "rarest of rare cases when the alternative option is unquestionably foreclosed". No litmus is provided nor any test formulated to discern precisely what is the rarest of the rare cases in which the alternative option is thus foreclosed. However, a Three Judge Bench of this Court in *Machhi Singh and Others v. State of Punjab*, AIR 1983 SC 957 has elaborated the ratio in *Bachan Singh* (supra). The Bench laid stress on the reaction of the community at large in cases "when its collective conscience is shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards distrability or otherwise of retaining death penalty". Rarest of rare cases would be discerned when the crime is viewed "from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime". The Bench has suggested a few instances thereof as guidelines and has observed that in order to apply those guidelines the following questions may be asked and answered : (1) was there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence: (2) Were the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

In *Dhananjoy Chatterjee v. State of West Bengal*, [1994] 2 SCC 220 in which one of us (Dr. Anand, J.), speaking for the bench has reaffirmed the said principle in the following terms;

"Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime."

A This was reiterated in *Bheru Singh v. State of Rajasthan*, [1994] 2 SCC 467. In the above cases as well as in certain other cases this Court confirmed the death sentence awarded as cases belonging to the category of "rarest of the rare cases" in consideration of the overall view adopted in each of such cases.

B Trial judge, after narrating the reasons to award death sentence to the appellants, has observed that "if this type of persons are allowed to escape death penalty it would result in miscarriage of justice and common man would loss faith in justice system", High Court also dealt with the sentence aspect in detail, giving "the most anxious consideration keeping in mind that the life once taken under the order of the court cannot be restored by the order of the court and that mercy seasons justice, but at the same time guards against misplaced sympathy for that would shake the confidence of the citizens in the administration of Justice and would have the tendency to tempt them to resort to private vengeance which would be destructive of the administration of justice."

E The three circumstances advanced by the learned counsel are too slender for treating them as mitigating circumstances. Even if we assume that such circumstances have any mitigative overtone they have been totally eclipsed by the other pillowing aggravative features looming large in the pizarre scenario of the crime unfurled in the evidence. Learned counsel tried repeatedly to strike a note of caution to us that the number of victims may not prejudicially influence our judicial perspective in awarding sentence of death. True, number of victims by itself is not a yardstick to discern a case of the category described by the Constitution Bench in *Bachan Singh's* case (supra). Nonetheless number of victims is not altogether outside the scope of consideration and should not be marginalised in appropriate cases. (vide *Sheikh Ishaque & Ors. v. State of Bihar*, [1995] 3 SCC 392.)

G Bearing in mind the principles governing the sentencing policy, particularly the death sentence, we have considered the overall picture in this case. We have no doubt that this is one of the rarest of the rare cases not merely because of the record number of innocent human beings roasted alive by the appellants but by the inhuman manner in which they have plotted the scheme and executed it. What they needed, perhaps, was only wealth by plundering others. For that motive they designed a scheme with

the highest proportion of viciousness. Carrying most inflammable liquid in A
a cane together with a match box they checked into a passenger bus during
the dawn of the ill-dated day. None of the harmless faces of the unfortunate
passengers, not even those of some cute children in the bus, had deterred
these appellants from incendiaring them into charred corpses in a split
second. When human mind was allowed to be transformed itself into such B
demonic form and the planned pogrom was executed with extreme
pedravity, we have no hesitation to agree with the courts below that this is
one of the rarest of the rare cases in which alternative option is unquestionably foreclosed.

We, therefore, confirm the sentence also. The appeal is accordingly C
dismissed.

V.S.S.

Appeal dismissed.